

JUDGE'S COPY

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JACK MARRONE, husband, KAREN
MARRONE, wife, both individually and
in their capacity as parents and guardians
for VIDA MARRONE, a minor, and
MATTHEW ADAM MARRONE,

Plaintiffs

vs.

ALLSTATE INSURANCE COMPANY,
LINDA M. EDLEMAN, FRED SCHAFER,
MT. GRETNAL REALTY, and HOUSE
MASTERS

Civil Action No.: 1:CV-01-0773

(U.S. District Judge Yvette Kane)

JURY TRIAL DEMANDED

FILED
HARRISBURG, PA

DEC 27 2002

MARY E. D'AMORE
Per [Signature] Clerk

BRIEF IN OPPOSITION TO DEFENDANT LINDA M. EDLEMAN'S MOTION TO STRIKE THE AFFIDAVIT OF ECKHARDT JOHANNING, M.D., M.S.C.

AND Now come the Plaintiffs, by and through their counsel of record, Tarasi, Tarasi & Fishman, P.C., Louis M. Tarasi, Jr., Esquire, and Gianni Floro, Esquire, and hereby file this Brief in Opposition to Defendant Linda M. Edleman's Motion to Strike the Affidavit of Eckhardt Johanning, M.D., M.S.C.

Introduction:

The Defendant, Linda M. Edleman, has filed a motion to strike the Affidavit of Eckhardt Johanning, M.D., M.S.C., seeking to prevent the Plaintiffs from presenting their expert medical causation reports to the Court, and in opposition to the motions for summary judgment of all the Defendants. She has filed her motion to strike for several reasons, including the timeliness of the submission and on the basis that the affidavit is alleged to be in violation of the Federal Rules of Civil Procedure.

Counter-Statement of the Facts:

On November 5, 2002, this Honorable Court granted the Plaintiffs' motion for additional time to respond to the motions for summary judgment. (Attached as Ex. 1, (and to the Br. In Supp. of Def. Linda M. Edleman's Mtn. To Strk. The Aff. of Eckardt Johnanning, M.D., M.SC.)) The Plaintiff obtained the Affidavit of Eckardt Johnanning, M.D., M.SC. inadvertently unnotarized in reply to the Defendant Edleman's motion for summary judgment. Thereafter Defendant, Linda M. Edleman, filed a Motion to Strike such affidavit; however, she has failed to attach a certificate of non-concurrence to her motion as required by local rule 7.1

Argument:

Although the Defendant Edleman has correctly pointed-out that the Affidavit of Eckardt Johnanning, M.D., M.SC., is not notarized, that Defendant ignores the language contained in F.R.C.P. 56(f) **When Affidavits are Unavailable**, which provides that:

Should it appear from affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

This Defendant goes on to suggest that Dr. Johnanning has not sworn his testimony, by the words provided in 28 U.S.C. § 1746; however, it is clear from the Affidavit of Dr. Johnanning that he states that "[t]he fact and opinions contained in my report are based upon my personal knowledge and experience..." While not is in the form prescribed by 28 U.S.C. § 1746, it is in substantially the form prescribed by 28 U.S.C. § 1746, it in fact complies with the spirit and purpose of § 1746. The Plaintiffs requested that Dr. Johnanning have his affidavit, which was to be attached to their response in opposition to the Defendants' motion for summary judgment, notarized, but he inadvertently failed to have his affidavit notarized; however, at the request of

Plaintiffs' counsel, his notarized affidavit is being now sent to Plaintiffs' counsel and will be forthwith filed with the Court.

Pursuant to F.R.C.P. 56(f), the undersigned submits the Affidavit of Eckardt Johanning, M.D., M.SC., which is in fact filed in opposition to the Defendants' motions for summary judgment is substantially in the form required in 28 U.S.C. § 1746.

Wherefore, the Plaintiffs respectfully request that this District Court enter an Order denying the motion to strike of the Defendant, Linda M. Edleman, and refusing the application for judgment of the Defendants, or enter an Order permitting Plaintiffs' counsel to file the same affidavit with the appropriate notarization.

Respectfully submitted,

TARASI, TARASI & FISHMAN, P.C.

By: 

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JACK MARRONE, husband, KAREN :
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for VIDA MARRONE, a minor, and :
MATTHEW ADAM MARRONE, :
Plaintiffs :

v. :

ALLSTATE INSURANCE CO., et al. :
Defendants :

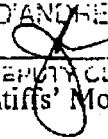
CIVIL ACTION NO. 1:CV-01-0773

(Judge Kane)

FILED
HARRISBURG

NOV - 5 2002

ORDER

MARY E. D'ANDREA, CLERK
Per.  DEPUTY CLERK

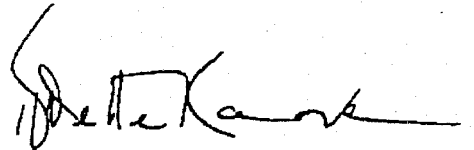
AND NOW, this 5th day of November, 2002, upon consideration of Plaintiffs' Motion

for Extension of Time in which to File Responses to Defendants' Motions for Summary

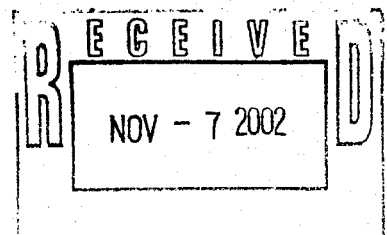
Judgment, it is HEREBY ORDERED that Plaintiffs' request is GRANTED. Plaintiffs are

granted twenty (20) additional days to respond to the summary judgment motions; responses

shall be due on or before November 25, 2002.



Yvette Kane
United States District Judge



Ex. 1

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Opposition to Defendant Linda M. Edleman's Motion to Strike the Affidavit of Eckhardt Johanning, M.D., M.SC. was served on counsel for the Defendants on this 26th day of December, 2002, by the United States Mail, First Class, Postage prepaid addressed as follows:

James G. Nealon, III, Esquire
Nealon & Grover, P.C.
2411 North Front Street
Harrisburg, PA 17110

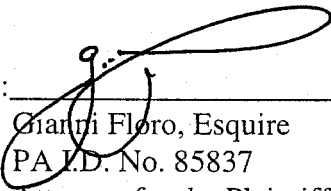
John Flounlacker, Esquire
Thomas, Thomas & Hafer, LLP
305 North Front Street
Harrisburg, PA 17108

Edward A. Monsky, Esquire
Fine, Wyatt & Carey, P.C.
425 Spruce Street
Scranton, PA 18501-0590

Jennifer L. Murphy, Esquire
Duane, Morris & Heckscher, LLP
305 North Front Street, 5th Floor
Harrisburg, PA 17108-1003

TARASI, TARASI & FISHMAN, P.C.

Date: 12/26/02

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Opposition to Defendant Linda M. Edleman's Motion to Strike the Affidavit of Eckhardt Johanning, M.D., M.S.C. was served on counsel for the Intervenor on this 27th day of December, 2002, by telefax and the United States Mail, First Class, Postage prepaid addressed as follows:

Joel D. Gusky, Esquire
(215) 568-1044
Harvey Pennington
Eleven Penn Center
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TARASI, ~~TARASI~~ & FISHMAN, P.C.

Date: 12/27/02

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LV-01-0073